United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7614

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

No. 75-7614

In the matter of the Arbitration of a Controversy between KNIT-AWAY, INC., *Petitioner-Appellee*,

and

L. W. FOSTER SPORTSWEAR CO., INC.,
Respondent-Appellant

BRIEF FOR RESPONDENT-APPELLANT

On Appeal from the Decision of the United States District Court for Southern District of New York, 75 Civ. 2354, on October 24, 1975.

Philip C. Patterson
BLANK, ROME, KLAUS & COMISKY
1100 Four Penn Center Plaza
Philadelphia, Pennsylvania 19103
(215) LO9-3700

Martin B. McNamara
SHEA, GOULD, CLIMENKO, KRAMER & CASEY
330 Madison Avenue
New York, New York 10017
(212) 661-3200

Of Counsel:
BLANK, ROME, KLAUS & COMISKY
1100 FOUR PENN CENTER PLAZA
PHILADELPHIA PA. 19103
(215) LO9-3700

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

TABLE OF CONTENTS

TABLE OF CONTENTS—*(Continued)*

TABLE OF CONTENTS—*(Continued)*

TABLE OF CITATIONS

Other Cases: Page

TABLE OF CITATIONS—(*Continued*)

Statutes: Page

Other Authorities:

STATEMENT OF ISSUES PRESENTED

1. When, after entering into an oral contract to sell and ship a large volume of goods to a buyer, a seller omits to mail a written confirmation confirming the oral contract, but instead sends a series of documents, each of which specifies a delivery date for a small portion of the goods covered by the oral contract, and each of which contains unchecked boxes which would have identified it as a confirmation had it been checked, is not each of the foregoing documents a mere shipment advice and not "a written confirmation" within the meaning of Sections 2-207(a) and 2-201(2) of the Uniform Commercial Code ("UCC"); and, in any event, do not they fail to comply with the requisite in §2-207(1) that a written confirmation be sent within a reasonable time?

2. When a seller responds to an oral or written purchase order and/or oral agreement by mailing a written confirmation which alters the prior purchase order and/or oral agreement, does not the law of the state where the purchaser resides govern the question whether the purchaser's failure to object to the alteration constituted an acceptance thereof?

3. When a seller responds to an oral or written purchase order and/or oral agreement by mailing a written confirmation which alters the prior purchase order and/or agreement by adding thereto an arbitration clause, is not the arbitration clause a "material alteration" within the meaning of UCC §2-207(2)?

4. Is not an arbitration clause in a written confirmation just as much a "material alteration" when such clauses are commonly used in written confirmations by sellers of the product in question and/or by two of the purchaser's suppliers of that product as when such clauses are not

commonly used thus by such sellers and/or by such suppliers?

5. If an arbitration clause in a written confirmation is a "material alteration" within the meaning of UCC §2-207(2), would not the purchaser's failure to expressly assent thereto preclude him from becoming bound thereby even if he accepted the goods with reason to know of the arbitration clause?

6. Is not UCC §2-201(2) irrelevant to the question whether the parties agreed to arbitrate disputes?

7. Even if it is assumed *arguendo* that an arbitration clause in a written confirmation is not a material alteration, does not the seller have the burden of establishing that the buyer knew or had reason to know of the arbitration clause?

8. In order to establish that the seller had "reason to know" of an arbitration clause on the reverse side of the seller's written confirmation, does not the seller have to show: (a) that there was a clause on the face of the confirmation which conspicuously referred to the arbitration clause; and (b) that trade practice, known to the buyer, was such that the buyer had a reasonable expectation that any written confirmation would contain an arbitration clause?

9. Has not Knit-Away failed to carry its burden of establishing that Foster knew or had reason to know of the arbitration clause on the reverse side of Knit-Away's alleged written confirmations?

STATEMENT OF THE CASE

A. *History Of The Proceeding*

This is an action to compel arbitration of a dispute, brought on May 7, 1975, in the New York Supreme Court for New York County by Knit-Away, Inc. ("Knit-Away"), a manufacturer of textile fabrics, against L. W. Foster Sportswear Co., Inc. ("Foster"), a manufacturer of sportswear, alleging that Foster had agreed to arbitrate the dispute. The dispute arose out of the sale of textile fabrics by Knit-Away to Foster. Foster contends that the goods are defective. Although Foster's affidavit averments that the goods were defective and were admitted by Knit-Away to be defective have not been controverted by any of Knit-Away's affidavits, Knit-Away apparently nevertheless wishes to recover the unpaid balance of the purchase price for the goods without deducting any of the damages sustained by Foster by reason of the goods' defectiveness.

This litigation was preceded, on May 5, 1975, by the filing and service by mail by Knit-Away of a Demand For Arbitration and Notice Of Intention To Arbitrate the dispute before the General Arbitration Council of the Textile Industry. On May 7, 1975, Knit-Away filed a Petition to compel arbitration in accordance with the above Demand and Notice with the New York Supreme Court for New York County.[1]

On May 19, 1975, Foster filed a Petition For Removal, seeking to remove the proceeding to the Court below on the ground of diversity of citizenship. In support thereof, the Petition For Removal alleged that Foster was a Pennsylvania corporation with its principal place of business in Pennsylvania; that Knit-Away was a North Carolina corporation with its principal place of business in a state other than Pennsylvania; and that the matter in contro-

1. Hereinafter, references to the "Petition" shall be deemed to refer to the said Petition to Compel Arbitration and not to the Petition for Removal mentioned in the next paragraph.

versy exceeded the sum or value of $10,000 exclusive of interest and costs.

The Petition For Removal was not opposed and the case was removed to the Court below.

On June 4, 1975, Foster filed an Answer to the Petition. Thereafter, Knit-Away filed an affidavit by Larry McDonald, its Manager of Quality Control, together with a Memorandum in support of its Petition; Foster filed an affidavit by Howard S. Foster, its President, together with a Memorandum in opposition to the Petition; and Knit-Away filed a Reply Affidavit by Larry McDonald, together with a Reply Memorandum. Hereinafter, these affidavits will be respectively referred to by the initials of the affiant "LM" or "HSF"), coupled with the number of the paragraph of the affidavit to which reference is made. Larry McDonald's Reply Affidavit will be distinguished from his initial Affidavit by inserting the letter "R" in parentheses immediately following his initials in references to his Reply Affidavit.

On October 2, 1975, the District Court filed a Memorandum Opinion granting the Petition. On October 24, 1975, the District Court entered a Judgment and Order granting the Petition, and directing the parties to proceed to arbitration of the controversy between them in accordance with the Petitioner's Demand for Arbitration and Notice of Intention to Arbitrate. Foster filed a Notice of Appeal with the Court below on October 31, 1975, and the record was transmitted to this Court on November 6, 1975.

B. *Statement Of Facts*

In August, 1974, Foster orally placed a single order with Knit-Away for certain textile goods and Knit-Away orally accepted Foster's said order (the "August, 1974 oral contract"). Howard S. Foster's affidavit specifically so states (HSF ¶3). That there was a single such order and oral contract in August, 1975, rather than a series of orders and contracts, must be deemed admitted by Knit-

Away, since Howard S. Foster's affidavit averments to that effect are not denied by Knit-Away's Reply Affidavit.

Subsequently, in the Fall of 1974, Knit-Away began to ship goods to Foster pursuant to the August, 1974 agreement, and the said shipments continued from time to time until February, 1975. (HSF ¶3).

At no time did Knit-Away send a written confirmation of the foregoing oral contract. Instead, at a short interval before each shipment, Knit-Away mailed to Foster a document (hereinafter referred to as a "shipment advice") listing a small fraction of the goods covered by the oral contract, and specifying a delivery date for that batch of goods (Exhibit A to Petition).[2] Altogether, twenty such documents were sent by Knit-Away to Foster on eleven different dates. Each of these documents contained two boxes, neither of which was checked. Had one of these boxes been checked, it would have identified the document as a "Confirmation Of Order." Had the other box been checked, it would have identified the document as a "Confirmation of Modification."

In the lower right-hand corner of each of these shipment advices appeared, in fine print which was much smaller than the typewritten material and even smaller than the printed headings in the body of the document, the following reference to terms and conditions on the reverse side:[3]

TERMS AND CONDITIONS OF CONTRACT[3]

"This confirmation is given subject to all of the terms and conditions on the face and reverse sides hereof, including the provisions for arbitration and

---

2. Attached hereto as Schedule A is an analysis of the identifying numbers, dates and quantities of the shipment advices and invoices.

3. The size of the print in which the ensuing excerpts from the shipment advices are set forth in this Brief conforms to Rule of Appellate Procedure 32(a) and, therefore, is in no way indicative of the fineness of the print in the shipment advices.

> exclusion of warranties all of which are accepted by Buyer, supersede the Buyer's order form if any, and constitute the entire contract between Buyer and Seller. Buyer shall be deemed to have assented to all of the terms and conditions hereof, and this confirmation shall become a contract for the entire quantity specified either when (a) this confirmation is signed and returned by Buyer to Seller and accepted in writing by Seller or (b) Buyer receives and retains this confirmation without objection for ten days, or (c) Buyer accepts delivery of all or any part of the merchandise ordered hereunder, or when Buyer has given to Seller specification or assortments, delivery dates, shipping instructions or instructions to bill and hold or when Buyer has otherwise assented to the terms and conditions hereof." CONTINUED ON REVERSE SIDE.[3]

On the reverse side, in equally fine print, appeared a large number of terms and conditions, one of which provides that

> "Any controversy arising out of or relating to this contract shall be settled by arbitration in the City of New York in accordance with the Rules then obtaining of the General Arbitration Council of the Textile Industry."[3]

None of these twenty documents was signed by Foster (LM ¶4). Each contains the initials of an unidentified person, not connected with Foster, in its lower left hand corner.

At the time of each shipment of goods covered by any of the foregoing shipment advices, Knit-Away sent to Foster an invoice pertaining to the shipment. See Exhibits "F" and "G" to the Petition for copies of all of the invoices which, according to Knit-Away, are either open (Exhibit "F") or partially open (Exhibit "G").

The shipments made by Knit-Away to Foster were made on a number of different dates during the period of October 15, 1974 through February 10, 1975 (Exhibits "F" and "GG" to Petition).

The following statements of fact by Howard Foster, in Paragraph 4 of his Affidavit, have not been disputed or denied by Knit-Away or by either of the Larry McDonald Affidavits:

> "There was no discussion of arbitration at the time of the August, 1974 agreement . . . The inclusion by Foster in small print on the reverse side of its shipping invoices of a statement concerning arbitration was done unilaterally by Knit-Away without Foster's knowledge or agreement."

After it had commenced to cut into garments some of the goods which Knit-Away had shipped to it, Foster discovered that some of these goods were defective (HSF ¶5). Foster promptly reported these defects to Knit-Away (HSF ¶5). It is undisputed that Knit-Away acknowledged these defects (HSF ¶6). It is also undisputed that, repeatedly, Knit-Away, through Larry McDonald, offered to submit the problem of the defective goods to arbitration (HSF ¶7); and that, based solely on these offers, and not upon any arbitration clause, Foster served a demand for arbitration upon Knit-Away (HSF ¶8), which Foster thereafter withdrew because it believed it had settled the dispute with Knit-Away (HSF ¶9).

In Larry McDonald's Reply Affidavit, he contends that a written confirmation used by a seller of textile goods in the textile fabric industry, *viz.*, Knit-Away's industry, "invariably contains a provision for arbitration of disputes" (LM ¶4). He does not, however, document this broad statement, as by attaching copies of textile fabric suppliers' written confirmation forms. Nor does he state whether the foregoing statement is based upon personal knowledge, or mere hearsay information. Nor does he identify the suppliers in the industry and state that he has examined

each such supplier's written confirmation. Nor does he otherwise state the basis for the foregoing statement. Accordingly, this statement has no evidentiary value and should be disregarded.

There is no evidence or even any contention in the record that sellers or buyers in Foster's industry, *viz.*, the garment industry, ever used arbitration clauses in written confirmations.

In the same affidavit, Mr. McDonald also contends that he "understands" that two of Foster's textile fabric suppliers, *viz.*, J. P. Stevens, Inc. and Burlington Industries, use an arbitration clause in their order confirmation forms. Here again there is no documentation or statement of the basis of the averment. Therefore, this affidavit averment, also, has no evidentiary value and should be disregarded.

ARGUMENT

I. When, After Entering Into an Oral Contract to Sell and Ship a Large Volume of Goods to a Buyer, a Seller Omits to Mail a Written Confirmation Confirming the Oral Contract and Instead Sends a Series of Documents Each of Which Specifies a Delivery Date for a Small Portion of the Goods Covered by the Oral Contract, and Each of Which Contains Unchecked Boxes Which Would Have Identified it as a Confirmation of Order or a Confirmation of a Modification of Order Had Either Box Been Checked, Each of the Foregoing Documents Is a Mere Shipment Advice and Not "A Written Confirmation" Within the Meaning of Sections 2-207(1) and 2-201(2) of the Uniform Commercial Code ("UCC"); and in Any Event, They Do Not Comply with the Requisite in §2-207(1) that a Written Confirmation Be "Sent Within a Reasonable Time."

A. *The Alleged Written Confirmations Are Mere Shipment Advices and Are Not "Written Confirmations" Within the Meaning of UCC §2-207(1) and UCC §2-201(2).*[4]

The alleged twenty written confirmations in the case at bar were not "written confirmations" but were advices as to shipment dates. There was no "written confirmation" in the case at bar. Had there been one, it would have confirmed the entire oral contract. A series of advices as to forthcoming shipment dates of particular portions of an oral contract is not in any way a confirmation of the oral contract. Therefore, it would be particularly unreasonable to hold that the buyer was on notice that it contained contractual provisions. Even in the case of inconspicuous arbitration clauses in written confirmations, the courts have refused to charge the buyers with constructive knowl-

4. UCC §2-207 and §2-201 appear in identical language in the Pennsylvania and New York statutes. 12A. Purd. Penna. Stats. §§2-207, 2-201 and NYCPLR §§2-207 and 2-201.

edge thereof. *E.g.*; *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 101 Cal. Rptr. 34, 10 UCC Rep. 1020 (Cal. App. 1972); *Tri-City Renta-Car and Leasing Corp.*, 33 A.D.2d 613, 304 N.Y.S.2d 682 (Third Dept. 1969); *Application of the Eimco Corp.*, 163 N.Y.S.2d 273 (N.Y. Supreme Ct., N.Y. Co. 1957); *Arthur Philip Export Corp. v. Leathertone, Inc.*, 275 App. Div. 102, 87 N.Y.S.2d 665 (First Dept. 1949). Even more so, therefore, should the courts refuse to charge the buyer with constructive knowledge of an inconspicuous arbitration clause when the document serves the function of a shipment advice or invoice. As was said by the California Court of Appeal in *Windsor Mills, Inc. v. Collins & Aikman Corp., supra*, 10 UCC Rep. at 1025, in the course of holding that a buyer of textile goods was not bound either by an arbitration clause on the reverse side of each of a number of written confirmations which its supplier had mailed to it in confirmation of a corresponding series of purchase orders all but one of which were oral, or by a clause on the front of each of the written confirmations referring to the arbitration clause:

> "It is true that the terms of a contract ordinarily are to be determined by an external, not an internal, standard; the outward manifestation or expression of assent is the controlling factor. . . . Accordingly, an offeree, knowing that an offer has been made to him but not knowing all of its terms, may be held to have accepted, by his conduct, whatever terms the offer contains. . . . However, when the offeree does not know that a proposal has been made to him this objective standard does not apply. . . . Hence, an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, *contained in a document whose contractual nature is not obvious*. . . .
>
> "This principle of knowing consent applies with particular force to provisions for arbitration. . . .

> "In the case at bench the trial court found that the provision for arbitration was in small print, was not conspicuous, the plaintiff was not advised the forms contained such a provision and that plaintiff did not have actual knowledge of the provision until after it had received defendant's demand for arbitration. It follows there was no agreement by plaintiff to arbitrate, regardless of its outward manifestations of apparent assent as exhibited by its retention of the forms without objection and its initial acceptance of the yarn. . . ." [emphasis added]

Thus, the Court in *Windsor Mills* held that the contractual nature of a written confirmation is not obvious even when it confirms an entire oral purchase order or contract. Much more so, therefore, is the contractual nature of a series of documents not obvious, when each merely specifies shipment data concerning a small part of a prior oral purchase contract. Particularly is this so, moreover, when, as in the case at bar, none of the boxes indicating whether it was a confirmation of order was even checked. That the failure to check any of the latter boxes reinforces the inference that the document was a mere shipping advice and not a confirmation of an order or of an oral contract is supported by the decision in *Stein Hall & Co. v. Nestle-LeMur Co.*, 13 Misc. 2d 542, 177 N.Y.S.2d 603, 605-606 (N.Y. Supreme Ct., N.Y. Co. 1958). In that case, the seller failed to check boxes on a written confirmation which indicated whether there was a reference to matter on the reverse side. The seller's failure to check these boxes was relied on by the Court in holding that the buyer was not bound by an arbitration clause on the reverse side of the written confirmation.

Since each of the twenty documents in question is a mere shipment advice and is not a confirmation of a prior order or oral contract, the provisions of UCC §2-107(1) making the failure to object within a reasonable time to a new term in a written confirmation binding on the buyer under certain circumstances are, for that reason alone,

inapplicable. Therefore, Foster's silence did not constitute agreement to be bound by the arbitration clauses on the reverse side of the foregoing twenty documents.

Moreover, this conclusion would be equally applicable to the provision in UCC §2-201(2) that a written confirmation of an oral contract satisfies the statute of frauds as between merchants if not objected to within ten days, were this statutory provision deemed not only to take the oral contract out of the statute of frauds but also to cause the recipient of the confirmation to be contractually bound by it.[5]

B. *The Alleged Written Confirmations in the Case at Bar Fail to Comply with the Requisite in UCC §2-207(1) That a Written Confirmation Be "Sent Within a Reasonable Time."*

Even assuming arguendo that the documents identified as Exhibit A to the Petition are "written confirmations", they nevertheless are not subject to UCC §2-207(1), since they did not comply with the requisite in UCC §2-207(1) that a written confirmation be "sent within a reasonable time."

Not by the wildest stretch of the imagination did the twenty shipment advices comply with the requirement in §2-207(1) that a written confirmation be "sent within a reasonable time." The mailing dates of the twenty shipment advices stretched over a five month period which itself did not end until six months after the date when the oral sales agreement was entered into. In order to comply with the "reasonable time" requirement, as well as the require-

5. According to the better view, UCC §2-201(2) is relevant only to the question whether the statute of frauds is applicable or not, and has no relevance to the question whether there was an agreement between the parties. E.g.: *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 10 UCC Rep. 1020, 1027 (Cal. App. 1972); *In The Matter Of The Arbitration Between John Thallon & Co., Inc. and M & N Meat Co.*, 17 UCC Rep. 31, 38-29 (E.D.N.Y. 1972). See Section VI hereof.

ment that there be a "written confirmation", a single written confirmation confirming the entire oral sales contract should have been mailed by Knit-Away to Foster within one week after the date of the oral sales contract.

II. When a Seller Responds to an Oral or Written Purchase Order and/or Oral Agreement by Mailing a Written Confirmation Which Alters the Prior Purchase Order and/or Oral Agreement, the Law of the State Where the Purchaser Resides Governs the Question Whether the Purchaser's Failure to Object to the Alteration Constituted an Acceptance Thereof.[6]

The sole question presented to the Court is the question whether Foster accepted Knit-Away's counter-offer of an agreement to arbitrate by failing to object thereto. The last act or omission necessary to create the alleged agreement to arbitrate, *viz.*, Foster's failure to mail or wire any objection thereto, occurred in Pennsylvania and not in New York or North Carolina. See Restatement of Conflict of Laws §§311, 326(b) and 327. Therefore, Pennsylvania law governs the question whether there was an agreement between Foster and Knit-Away to arbitrate.

In *Roto-Lite, Ltd. v. F. P. Bartlett & Co., Inc.*, 297 F.2d 497 (1 Cir. 1962), the Court stated that the law of the seller's state applies if there are no new terms in the written confirmation, since, in such event, the written confirmation was the last material act which resulted in the creation of the contract. The Court thereby clearly implied that when there are new terms in the written confirmation, the law of the state where the buyer allegedly accepted the new

6. Although we contend that the twenty documents which together comprise Exhibit A to the Petition were mere shipment advices and not written confirmations, we will assume *arguendo* in the remainder of this brief that they were "written confirmations" and, for convenience of analysis, will at times thus refer to them. This is not to be taken as an abandonment of our position that they are not "written confirmations".

terms, *viz.*, the state where the buyer's principal place of business is located, would govern the question whether the buyer became contractually bound by the new terms.

III. When a Seller Responds to an Oral or Written Purchase Order and/or Oral Agreement by Mailing a Written Confirmation Which Alters the Prior Purchase Order and/or Oral Agreement by Adding Thereto an Arbitration Clause, the Arbitration Clause Is a "Material Alteration" Within the Meaning of Section 2-207(2) of the Uniform Commercial Code.

Under UCC §2-207(2), a purchaser's failure to object within a reasonable time to new terms in a written confirmation of a prior offer or agreement causes the purchaser to be bound by the new terms, unless, *inter alia*, they "materially alter" the prior offer or agreement.

Arbitration so drastically changes and limits the parties' procedural rights that it is not surprising that, according to the overwhelming weight of authority, an arbitration clause in a confirmation is a "material alteration" of the prior offer or agreement. *Just Born, Inc. v. Stein Hall & Co., Inc.*, 59 Pa. D. & C. 2d 407, 411-412 (C.P. North. Co. 1971); *Frances Hosiery Mills, Inc. v. Burlington Industries, Inc.*, 285 N.C. 344, 204 S.E.2d 834, 14 UCC Rep. 1110, 1117-1118 (1974), *aff'g*, 19 N.C. App. 678 (1973); *Application of Doughboy Industries, Inc.*, 17 A.D.2d 488, 495-496 1 UCC Rep. 77, 84 (First Dept. 1962); *In The Matter of the Arbitration Between John Thallon & Co., Inc. and M & N Meat Co.*, 17 UCC Rep. 31, 38 (E.D.N.Y. 1975) (and cases cited at page 38); *Windsor Mills, Inc. v. Collins & Aikman Corp., supra*, 10 UCC Rep. 1020, 1027 (Cal. App. 1972).

The *Frances Hosiery Mills* and *Windsor Mills* cases both involved sales of textile goods and arbitration clauses in written confirmations identical to the arbitration clause sought to be asserted in the case at bar. The Court in *Windsor Mills* explained its holding that the arbitration clause was a "material alteration" as follows (1 UCC Rep. at 1027):

> "In New York, where the arbitration was to take place under the terms of the provision, arbitration has been defined as 'a contractual method for solving disputes in which the parties create their own forums, pick their own judges, waive all but limited rights of review or appeal, dispense with the rules of evidence, and leave the issues to be determined in accordance with the sense of justice and equity that they may believe reposes in the breasts and minds of their self-chosen judges' " *(Schiller v. Cosmopolitan Mutual Cas. Co.*, 191 N.Y.S.2d 852, 855 [1959]).

In the light of this drastic abridgement of procedural rights, any contention that the arbitration clause set forth in Exhibit A to the Petition is not a "material alteration" of the antecedent oral order and agreement is so lacking in merit as to be frivolous.[7]

IV. An Arbitration Clause in a Written Confirmation Is Just as "Material" an Alteration When Such Clauses Are Commonly Used in Written Confirmations by Sellers of the Product in Question and/or by two of the Purchaser's Suppliers of the Product in Question as When Such Clauses Are Not Commonly Used Thus by Such Sellers or Suppliers.

In the Statement of Facts, we have demonstrated that the affidavit averments as to trade practice in the textile fabrics industry must be rejected since they do not disclose whether they are based upon hearsay or personal knowledge.

Even if it were assumed, *arguendo*, that arbitration clauses were commonly used by sellers of textile goods in written confirmations at the time when Foster received the twenty alleged written confirmations, this would not convert the arbitration clause from a material

7. For a quotation from *Frances Hosiery Mills* on this subject, see footnote 9 at page 22 hereof

alteration of the oral contract to a non-material alteration thereof.

In either event, we have an oral contract which admittedly did not contain any agreement to arbitrate and we have a proposed modification of the oral contract which would drastically alter and abridge the parties' procedural rights in the various ways described in the excerpt from the *Windsor Mills* Opinion quoted above.

The relative frequency or infrequency of a proposal by sellers to drastically abridge the procedural rights of their customers has no pertinence to the issue whether such a proposal would "materially alter" the prior order or agreement. The only fact issue to which proof of a trade practice to include arbitration clauses in written confirmations would have any arguable pertinence would (if the clauses were conspicuous) be the issue whether the purchaser had reason to know of the arbitration clause. Since UCC §1-207(2) precludes a proposed material alteration from being accepted by silence *when the buyer knows of it* as well as when the buyer does not know of it, it is obvious that evidence that proposals of alterations of this type are frequently made in the buyer's industry has no relevance to the issue whether such a proposed alteration is a "material alteration."

The same comment is equally applicable to the affidavit averment that two named suppliers of Foster commonly use an arbitration clause in their order confirmation forms. As stated in the Statement of Facts, this affidavit averment should be disregarded, since there is no showing that it is based on personal knowledge rather than hearsay. Even if it is accepted as true, however, it does not in any way contravene the undeniable fact that the arbitration clause was a "material alteration" of the antecedent order or agreement.

Why should the mere fact that sellers usually propose to their customers that they agree to drastically alter their purchase orders make the proposed alteration a non-material one? At best, the only significance of the alleged

trade practice would be that, if a particular customer was aware of the practice, he might then check a particular written confirmation and ascertain that the seller was trying to drastically alter the order or agreement, in which event he would then have the opportunity of rejecting the proposed alteration. It would not mean, however, that he would not, or could not, reject the proposed alteration.

If Knit-Away is trying to imply that textile buyers would be forced by their suppliers to accept arbitration clauses no matter how vigorously they objected thereto, the record does not support any such argument. There is nothing whatsoever in the record to show that textile buyers do not successfully object to arbitration clauses. The possibility that textile buyers could, and in fact, do successfully object to the clauses constitutes one more reason why the alleged frequency with which they are proposed by sellers does not covert them from "material alterations" into "non-material alterations."

Moreover, even had it been shown by Knit-Away that the textile sellers have refused to waive the arbitration clauses when objected to by textile buyers, this would not put an end to the matter, since, in that event, they would undoubtedly be held to constitute unenforceable contracts of adhesion. In fact, judicial aid to any uniform refusal by sellers to waive such clauses would constitute state action which, because it would abridge vital procedural rights, would constitute a denial of due process of law in violation of the Fourteenth and Fifth Amendment, depending on whether the court was a state or federal court.

For all of the above reasons, the averments as to use of arbitration clauses by other textile manufacturers would not have precluded the arbitration clauses from being "material alterations" even had the said averments been based on personal knowledge and even had it been shown that, despite the fact Foster was engaged in a different industry from that in which Knit-Away was engaged, Foster knew that garment manufacturers invariably or commonly used such clauses.

For the reasons stated above, as was done in *Windsor Mills*, *Frances Hosiery Mills*, *Just Born* and *Thallon*, this Court should find as a matter of law that the arbitration clause in the shipment advices was a "material alteration." If the Court declines to so hold as a matter of law, however, the Court should, as was done in *Dorton*, direct an evidentiary hearing on the issue whether there was a "material alteration."

V. If an Arbitration Clause in an Order Confirmation Is a "Material Alteration" Within the Meaning of UCC §2-207(2), the Purchaser's Failure to Expressly Assent Thereto Would Prevent Him From Becoming Bound Thereby Even if He Accepted the Goods with Reason to Know of the Arbitration Clause.

Howard Foster's affidavit averment that Foster did not know that the documents identified as Exhibit A to the Petition contained arbitration clauses (HSF ¶4) was not contradicted by either of Knit-Away's affidavits, and therefore must be deemed to have been admitted by Knit-Away. Furthermore, as has already been demonstrated in the Statement of Facts and as will be further demonstrated in Section VII hereof, the lack of contractual significance of the said documents and the inconspicuousness both of the arbitration clause and of the reference thereto prevented Foster from having "reason to know" that the documents contained an arbitration clause.

Even if we assume *arguendo* that Foster had reason to know that the said documents contained arbitration clauses, however, the fact that the arbitration clauses "materially altered" the antecedent order or agreement precluded Foster's failure to expressly object from causing Foster to become bound thereby.

That is what UCC §2-207(2)(a) specifically provides. With respect to additional terms added by an expression of acceptance or written confirmation which operates as

an acceptance under UCC §207(1),[8] UCC §2-207(2) provides as follows:

> "(2) The additional terms are to be construed as proposals for addition to the contract. *Between merchants such terms become part of the contract unless:*
>
> (a) the offer expressly limits the terms of the offer;
> (b) *they materially alter it;* or
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them." [emphasis added]

Quite clearly §2-207(2) provides that materiality of an alteration will preclude it from being part of the contract unless the purchaser expressly agrees thereto, regardless whether the purchaser has received notice of the alteration and regardless whether the purchaser has received and retained the goods. As was said by Comment No. 5 in the Commentary in the Official Text of the UCC under §2-207:

> "Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original agreement, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain, they will be incorporated unless notice of objections to them has already been given or is given within a reasonable time."

Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6 Cir. 1972), quite clearly held that acceptance by a buyer

8. Under UCC §2-207(1), an expression of acceptance does not operate as an acceptance unless it is "definite and seasonable", and a written confirmation does not operate as an acceptance unless it "is sent within a reasonable time." As has been shown in section I hereinabove, the documents identified as Exhibit A did not comply with any of these tests.

of goods shipped to him by a seller does not cause additional terms in a written confirmation which materially alter the prior order or agreement to become binding on the buyer, regardless of whether the buyer has reason to know of the additional terms when he receives the goods. In that case, in each of over fifty-five sale transactions, after receiving a written confirmation containing an arbitration clause, the buyer had received and retained the goods ordered by him, without objecting to the arbitration clause. No contention was made by the buyer that he had not had reason to know that the written confirmation contained an arbitration clause, and therefore, it must be assumed that the buyer had had reason to know of the confirmation clause. Notwithstanding the fact that the purchaser had in each instance received and retained the goods without objecting to the arbitration clause in the written confirmation, the Court ruled as follows (453 F.2d at 1170):

> "Regardless of whether the District Court finds Collins and Aikman's [the seller] acknowledgement forms to have been acceptances or confirmations, if the arbitration provision was additional to, and a material alteration of, the offers or prior oral agreements, the Carpet Mart [the buyer] will not be bound to that provision absent a finding that it expressly agreed to be bound thereby."

Frances Hosiery Mills, Inc. v. Burlington Industries, Inc., supra, 285 N.C. 344, 204 S.E.2d 834, 14 UCC Rep. 1110, is peculiarly in point, since it involved the purchase by a hosiery manufacturer of yarn from one of the two textile goods suppliers which, according to Larry McDonald's Reply Affidavit, is one of Foster's suppliers and uses an arbitration clause in its written confirmation form. In that case, on each of four occasions, the buyer placed a telephone order with the seller, ordering yarn; and the seller mailed a written confirmation to the buyer which contained an arbitration clause on the reverse side providing for arbitration in New York and stated on the front side the following:

> "In any event, delivery of yarn to seller for processing or acceptance by buyer of any part of such processed yarn shall constitute acceptance of this contract and all of the terms and conditions."

Thus it had the precise provisions which are contained in Knit-Away's alleged confirmations. Following receipt by the buyer of each confirmation, the goods which it had ordered were shipped to and received by it, without its making any objection to the arbitration clause or any of the other provisions quoted above. Subsequently, a controversy arose between the parties concerning the quality of the yarn. The buyer refused to pay for it, contending it was defective. The seller served a notice of arbitration hearing, and after the buyer had moved in the arbitration proceeding to dismiss it on the ground that it had never agreed to arbitrate any dispute, an arbitration award was entered by default and confirmed by the New York Supreme Court by default. Meanwhile, the purchaser had instituted an action in its home state, North Carolina. In the latter case, the jury found that the arbitration clause constituted not only a term additional to and different from those orally agreed upon, but also a "material alteration" of the latter terms. Accordingly, not only the trial court but also the North Carolina Court of Appeals and the North Carolina Supreme Court held that the arbitration clause and award were not binding upon the purchaser. According to the North Carolina Supreme Court (14 UCC Rep. at 1118):

> "Beyond question, such a change in the contract would be a material alteration of it. Consequently, such proposed additional provision may not be deemed incorporated into the contract for sale of yarn between these parties by reason of the mere silence of the plaintiff following its receipt of the defendant's Exhibits A, B, C, and D. The 'Official Comment' following the above quoted section of the Uniform Commercial Code states:

'Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.'

It follows that there was no agreement by the plaintiff to submit its claim for breach of the contract to arbitration in New York, and therefore, the New York court was without jurisdiction to enter the judgment upon which the defendant relies."[9]

VI. UCC §2-201(2) Is Irrelevant to the Question Whether the Parties Agreed to Arbitrate Disputes.

Subsection 1 of UCC §2-201 is the statute of frauds pertaining to contracts for the sale of goods for the price of $500 or more. It provides that, except as otherwise provided in that section, such a contract is not enforceable by way of action or defense

---

9. The Court explained its holding that the arbitration clause was a "material alteration" of the antecedent oral contract with the following reasoning, which is squarely applicable to the case at bar (14 UCC Rep. at 1117):

"Over strenuous belated objections by the plaintiff, the defendant has steadfastly refused to yield its preference for arbitration in New York over litigation in North Carolina. It ill behooves the defendant now to contend that this alleged addition to the oral contract was of no consequence to the parties and, therefore, not a material change therein. Obviously, under the oral contract, the plaintiff was entitled to present to the courts of North Carolina such claim as it may have against the defendant for breach of that contract. Under the alleged additional term, it could not do so but would be confined to a presentation of its claim to a board of arbitration in New York."

". . . unless there is some writing sufficient to indicate that a contract for sale has been made between the parties, and signed by the party against whom enforcement is sought or his authorized agent or broker."

Section 2-201 takes a contract out of the statute of frauds when a confirmation thereof is received and not objected to, as follows:

"Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received."

Nothing could be clearer than the fact that §2-201(2) merely sets forth an exception to the statute of frauds, and that it does not deal with the question whether additional terms in a confirmation become a part of the contract when not objected to by the recipient of the confirmation. Most of the Courts which have passed on this question have so held. *E.g.: Windsor Mills, Inc. v. Collins & Aikman Corp.*, 10 UCC Rep. 1020, 1027 (Cal. App. 1972); *In the Matter of the Arbitration Between John Thallon & Co., Inc. and M & N Meat Co.*, 17 UCC Rep. 31, 39 (E.D.N.Y. 1975). As was said by the Court in the latter case (17 UCC Rep. at 39):

"Petitioner's second argument concerns §2-201 of the Uniform Commercial Code. . . .

"The Court is not persuaded by this argument. Section 2-201(2) merely defines formal requirements necessary to satisfy the Statute of Frauds (see Uniform Commercial Code, Comment No. 3). Compliance with the statute of frauds is not the issue here; it is whether the arbitration provision in Petitioner's contract of sale constituted an 'agreement to arbitrate' under 9 USC §§3 and 4. *Windsor Mills, Inc. v. Collins & Aikman Corp.*, supra, p. 1027."

Similar reasoning appears in the opinion in *Windsor Mills, Inc. v. Collins & Aikman, supra*, 10 UCC Rep. at 1027.

The question under consideration was not even discussed in the *Just Born, Doughboy, Frances Hosiery Mills* and *Dorton* opinions. Necessarily, however, these decisions are in effect precedents for the inapplicability of UCC §2-201(2).

Notwithstanding the clear language of UCC §2-201(2), a palpably erroneous interpretation of that provision has crept into certain *nisi prius* decisions by the New York Supreme Court, in which a buyer's failure to object within ten days to a written confirmation has been held to render an arbitration clause thereby binding on the buyer if the buyer had reason to know that the confirmation contained an arbitration clause. These decisions were occasioned by a misinterpretation of a decision by a four-man panel of the New York Supreme Court's Appellate Division's First Department in *Trafalgar Square, Ltd. v. Reeves Brothers, Inc.*, 35 A.D.2d 194, 315 N.Y.S. 239, 8 UCC Rep. 343 (First Dept. 1970). In the *Trafalgar* case, the buyer contended that an arbitration clause in a confirmation was barred by the statute of frauds because the confirmation had not been signed by it. The Court pointed out that, under §2-201(2), this objection was not available, since the buyer had failed to object to the arbitration clause within ten days after he had received it.

Clearly, the Court construed §2-201(2) consistently with the *Windsor Mills* and *Thallon* interpretations of §2-201(2). However, *nisi prius* judges in several Supreme Court decisions have misunderstood *Trafalgar* and have construed it as having dealt with the content of the actual agreement between the parties as well as the formalities required by the statute of frauds. *In re Dalil Fashions, Inc.*, 12 UCC Rep. 478, 479 (N.Y. Supreme Ct., N.Y. Co. 1973); *In re Wolfkill Feed & Fertilizer Corp.*, 16 UCC Rep. 1188, 1193-1195 (N.Y. Supreme Ct., N.Y. Co. 1975); *In re C.M.I. Clothesmakers, Inc.*, 17 UCC Rep. 911 (N.Y.Supreme Ct.

N.Y. Co. 1975); *Klockner, Inc. v. C. Itoh & Co. (America, Inc.)*, 17 UCC Rep. 915 (N.Y. Supreme Ct., N.Y. Co. 1975).

It is interesting to note that the Court in *Wolfkill* recognized that this interpretation of UCC §2-201(2) does violence to its language. Concerning this interpretation of §2-201(2), the Court said (16 UCC Rep. at 1190):

> "Such an apparent extension of subdivision 2 of §2-201 beyond its intended scope of satisfying the statute of frauds would, at first blush, appear unjustified."

Nonetheless, the Court in *Wolfkill* thereafter adopted this interpretation on the supposed authority of the *Trafalgar* decision[10]; and the *Dalil*, *Klockner* and *C.M.I.* decisions followed suit. Since the *Trafalgar* decision does not support the extension of §2-201(1) adopted in *Dalil* and *Wolfkill*, *Klockner* and *C.M.I.* cases, these decisions should be ignored even were New York law binding. An additional reason for ignoring these decisions, moreover, is that decisions by *nisi prius* courts of a particular state are not binding upon a federal court which is seeking to determine the law of that state. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 851 (2d Cir. 1967). It should be further noted, moreover, that the New York decisions are themselves in conflict on the point in question. For example, a *point of view* contrary to that expressed in *Dalil*, *Wolfkill*, *Klockner* and *C.M.I.* was expressed by the Court in *In re Associated Lerner Shops of America, Inc.*, 17 UCC Rep. 348, 349-350 (New York Supreme Ct., N.Y. Co., 1975), as follows:

> "The ten-day limitation of the statute, as already indicated, deals with the statute of frauds; the exis-

---

10. The Court in *Wolfkill* and *C.M.I.* contended, without giving any further explanation, that the words "has reason to know its contents" in §2-201(2) in some way justified this extraordinary interpretation. Since the only effect of the failure to object for ten days to a written confirmation stated by §2-201(2) is that "it satisfies the requirements of subsection (1)" [the statute of frauds provision], the foregoing rationale is obviously fallacious.

> tence of a contract may still be challenged. An observation made by the editors of the UCC Reporting Service with respect to §2-201(2), is apropos: Section 2-201 imposes a duty to object only for the purpose of reserving the statute of frauds; it does not ordain the silence itself results in a binding obligation. The better view is that an arbitration is an 'added material term' which does not become part of the contract merely because the buyer fails to object to it."

Elsewhere in its opinion, the Court gave as an alternative basis of its decision the fact that, unlike in the *Trafalgar* case, the written confirmation had not been received until after the goods had arrived. However, since the interpretation of §2-201(2) expressed above (and earlier in this opinion, also), is just as applicable to a case where the written confirmation arrives before the goods as to a case where the written confirmation arrives after the goods, and since the "material alteration" limitation set forth in UCC §2-207(2)(b) is just as applicable in the former situation as to the latter situation, it is clear that the decision in *Lerner* would have been no different had the written confirmation arrived first. Moreover, Pennsylvania law, rather than New York law, governs. As is demonstrated, both by the holding and the opinion in *Just Born v. Stein, Hall & Co., Inc.*, *supra*, 59 D. & C. 2d 407 (C.P. North Co., 1971), *supra*, the judicial policy in Pennsylvania is that arbitration clauses will not be enforced unless expressly agreed to. As was said by the Court in that case:

> "The Pennsylvania policy with regard to arbitration agreements is similar to New York law relied upon by Doughboy. In Scholler Bros. Inc. v. Hagen Corp., 158 Pa. Superior Ct., 170, 173 (1945), it was held that . . . [A]s an arbitration agreement bars recourse to the courts where arbitrators are named in advance at common law . . . and even if not named

in advance under the Act of 1927, *the assent to relinquish a trial by jury is not to be found by mere implication.*" [emphasis added]

Scholler further noted that:

"No technical or formal words are necessary to constitute a reference of a controversy to arbitration; but *it must clearly appear that the intention of the parties was to submit their differences to a tribunal and to be bound by the decision reached by that body on deliberation.*" [emphasis added]

VII. Even if It Is Assumed Arguendo That an Arbitration Clause Is Not a Material Alteration, the Seller Has the Burden of Showing That the Purchaser Had Reason to Know of the Arbitration Clause.

Even the New York cases which have tortured UCC §2-201(2) out of all recognition in the manner described above have conceded that the seller's failure to show that the purchaser had reason to know of the presence of the arbitration clause on the reverse side of the written confirmation would preclude the purchaser's failure to object thereto from causing him to be bound thereby. *In re Dalil Fashions, Inc., supra; In re Wolfkill Feed & Fertilizer Corp., supra; In re C.M.I. Clothesmakers, Inc., supra; Klockner, Inc. v. C. Itoh & Co. (America) Inc., supra.* Other cases which have so held include: *Windsor Mills, Inc. v. Collins & Aikman Corp., supra,* 101 Cal. Rptr. 34, 10 UCC Rep. 1020 (Cal. App. 1972); *Tri-City Renta-Car and Leasing Corp., supra,* 33 A.D.2d 613, 304 N.Y.S.2d 682 (Third Dept. 1969); *Arthur Philip Export Corp. v. Leathertone Corp., supra,* 275 App. Div. 102, 87 N.Y.S. 2d 665 (First Dept. 1949).

VIII. In Order to Establish That the Seller Knew or Had Reason to Know of an Arbitration Clause on the Reverse Side of the Seller's Written Confirmation, the Seller Has to Show (a) That There Was a Clause on the Face of the Confirmation Which Conspicuously Referred to the Arbitration Clause; and (b) That Trade Practice, Known to the Buyer, Was Such That the Buyer Had a Reasonable Expectation That Any Written Confirmation Would Contain an Arbitration Clause.

In all of these cases pro and con the enforceability of an arbitration clause, the arbitration clause was on the reverse side of the written confirmation, and there was a clause (hereinafter called a "reference clause") on the front of the written confirmation referring to the arbitration clause. In order to satisfy the overall requirement that the buyer must have had "reason to know" of the arbitration clause, the courts have prescribed the following two subsidiary requirements: (a) the reference clause must be conspicuous, (*Windsor Mills, Inc. v. Collins & Aikman Corp., supra; Tri-City Renta-Car and Leasing Corp., supra;* and *Arthur Philip Export Corp. v. Leathertone Corp., supra*); and (b) even if the reference clause was conspicuous, existing trade practice, known to the buyer, must have been such as to show that the buyer "had a reasonable expectation that a provision for arbitration would be included in any written confirmation", *In re Wolfkill Feed & Fertilizer Corp.*, 16 UCC 1188, 1195 (N.Y. Supreme Ct., N.Y. Co. 1975).

The first of these two requisites, *viz.*, that the reference clause must be conspicuous, is expressly supported by the holdings in *Windsor Mills* and *Tri-City*. In each of these two cases, the Court held that the arbitration clause was not contractually binding on the buyer because the refer-

ence clause was inconspicuous.[11] As was said by the Court in *Windsor Mills* (10 UCC Rep. at 1026):

> "In the case at bench the trial court found that the provision for arbitration was in small print, was not conspicuous, that plaintiff was not advised the forms contained such a provision and that plaintiff did not have actual knowledge of the provision until after it received defendant's demand for arbitration. It follows that there was no agreement to arbitrate, regardless of its outward manifestations of apparent assent as exhibited by its retention of the forms without objection and its initial acceptance of the yarn."

Next, the requirement that even if the reference clause is conspicuous, the buyer must have a reasonable expectation that an arbitration clause would be included in any written confirmation, was specifically prescribed by the Court in *Wolfkill*. According to the Court in that case (16 UCC Rep. at 1194-1195):

> "There is no question that the statutory language 'had reason to know' [in UCC §2-201(2)] should not be construed to mean 'had reason to see', as buyer [the proponent and author of the confirmation] seems to argue. *In any event, buyer's contention that seller is bound to arbitrate for the sole reason*

11. This requisite is implicitly supported by the Arthur Philip case. In sustaining an arbitration clause because the written confirmation was signed by the buyer and contained a reference clause which was "in bold type", the Court, in *Application of Central States Paper Bag Co.*, 132 N.Y.S.2d 69 (N.Y. Supreme Ct., N.Y. Co. 1954), *aff'd*, 284 App. Div. 841, 134 N.Y.S.2d 271 (First Dept. 1954), distinguished the *Arthur Philip* case on the ground that, in that case, "there appeared in small print on the right side in the lower center of the face of the order the legend, (see also back)." Thus, both the *Arthur Philip* decision and the *Central States* opinion support the requirement that the reference clause must be conspicuous.

that the arbitration clause at issue was clearly visible on the face of the buyer's purchase order had no basis in law or in any reasonable construction of the statute in question. If buyer's contention had any merit the decisions under discussion relied unnecessarily on the provisions of §2-201(2). . . .

"In the opinion of the court, *Trafalgar Square* and the decisions which follow it are clear authority for the proposition that in order to demand arbitration under §2-201(2) it should be required to show that the receiving merchant had a reasonable expectation that a provision for arbitration would be included in any written confirmation of the contracting parties' oral agreement. Proof of either prior sales transactions wherein arbitration was agreed upon, or of a trade practice to arbitrate controversies, would appear essential for such a showing. Furthermore, such a construction should have the salutary effect of substantially reducing the risk of a party being thrust into arbitration by surprise." [emphasis added]

The Court further explained the reason for imposing this requirement as follows (16 UCC Rep. at 1195):

"As observed by Professor Bernstein, . . . 'arbitration entails so many departures from court litigation — practically no pleadings, no jury, no need to follow rules of evidence, . . . and no need to follow substantive law — that a party to an arbitration agreement should be on notice of what he is getting into' (42 N.Y.U. L. Rev., supra, at 15)."

IX. Knit-Away Has Failed to Carry Its Burden of Establishing That Foster Had Reason to Know of the Arbitration Clause on the Reverse Side of Knit-Away's Alleged Written Confirmations, Because: (a) The Alleged Twenty "Confirmations" Were Mere "Shipment Advices" Rather Than Confirmations; (b) The Only Reference on the Face of the Alleged Confirmations to the Arbitration Clause Was Inconspicuous; (c) The Affidavit Averments as to Trade Practice Were Not Shown to be Based on Personal Knowledge, and Their Basis Was Not Shown; (d) The Alleged Trade Practice Related to Knit-Away's Industry and Not Foster's Industry; and (e) There Was No Showing That Foster Knew of the Alleged Trade Practice.

Howard Foster's affidavit averment (HSF ¶4) that Foster did not know of the arbitration clause is uncontradicated. Therefore, we need only address ourselves to the issue whether Knit-Away has carried its burden of establishing that Foster had "reason to know" of the arbitration clause. In and of itself, each of the five circumstances enumerated in the heading for this section constitutes an independent reason why Knit-Away has not carried its burden of establishing that Foster had "reason to know" of the arbitration clause.

Since they were mere shipment advices (see Section I hereof), the documents which contain the arbitration clauses on their reverse sides did not have any obvious contractual significance. Therefore, Foster was not sufficiently put on notice that it should scrutinize them to ascertain whether, and, if so, to what extent, they proposed new and additional contractual terms.

Also, the requisite enunciated in the *Wolfskill* case, *viz.*, that the buyer must have had a reasonable expectation that any written confirmation would contain an arbitration clause, was not shown to have been complied with. One reason, of course, was Knit-Away's total failure either to show that its affidavit averments as to trade prac-

tice [LM(R) ¶4] were based on personal knowledge, or to show what the basis of these averments were. For these reasons alone, the said affidavit averments as to trade practice should be disregarded.

Even if it be assumed *arguendo* that Knit-Away's affidavit averments as to trade practice are true, however, Knit-Away has still not shown compliance with the aforesaid "reasonable expectation" requisite. The reasons for the latter conclusion are the following: (a) So far as the record shows, the alleged trade practice of including an arbitration clause in a written confirmation was engaged in only by members of Knit-Away's industry, *viz.*, manufacturers of textile materials, and was not shown to have engaged in by any members of Foster's industry; and (b) There has been no showing that Foster knew of the alleged trade practice of textile material manufacturers to include arbitration clauses in written confirmations, or that the reference clauses in other manufacturers' written confirmations were sufficiently conspicuous to charge Foster with knowledge of the said other manufacturers' use of arbitration clauses in their confirmations.

Proof of trade practices on the part of manufacturers of textile materials is hardly enough to charge a member of another industry, such as garment manufacturers, with knowledge of those practices. *In re Wolfkill Feed & Fertilizer Corp., supra*, 16 UCC Rep. at 1188. As was said in that case (16 UCC at 1196):

> "Furthermore, assuming buyer succeeded in sustaining its claim that arbitration is 'standard in the export fertilizer industry', an issue of fact would remain as to whether the parties commonly engage in the same trade. If, in fact, it were found that they were primarily engaged in separate fields of commerce, it would appear necessary to determine whether arbitration is customary in the 'domestic' fertilizer business."

The mere fact that a garment manufacturer has purchased textile goods from one or more textile manufacturers is not a sufficient reason for charging him with knowledge of the trade practices employed by textile manufacturers generally. Even had Knit-Away established that Foster had purchased textile goods from the two textile goods suppliers mentioned in Larry McDonald's Reply Affidavit and that their written confirmations contained arbitration clauses, this would not have constituted a sufficient basis for charging Foster with a reasonable expectation that all or even most other suppliers would insert an arbitration clause in their confirmations.

In the first place, there has been no showing either that the said two suppliers' written confirmations contained conspicuous reference clauses, or that other circumstances existed which demonstrated that Foster knew of the alleged arbitration clauses in their written confirmations. It is just as likely as not that both the arbitration clauses and the reference clauses in these two suppliers' written confirmations were inconspicuous and in small print, in which event the probabilities are that Foster did not know of them.

In the second place, even had it been shown that the said two suppliers' written confirmations had contained arbitration clauses, and that Foster had known of these arbitration clauses, this would still not have been enough to cause Foster to have a reasonable expectation that any written confirmation used by any other textile goods manufacturer would contain an arbitration clause.

For all of the above reasons, Knit-Away has not carried its burden of showing that Foster had a reasonable expectation either that any written confirmation would contain an arbitration clause or that the twenty shipment advices would contain such a clause.

Because Knit-Away has not carried the last mentioned burden, it should be found that, even if the arbitration and reference clauses were conspicuous, Knit-Away

has not established that Foster had reason to know of the arbitration clauses. Still another reason why the Court should so find, moreover, is that both the arbitration clause and the reference clause in the twenty shipping advices were inconspicuous and in fine print. Each of these clauses was in fine print and was a great deal smaller than the printed and typewritten matter which appeared at the top and in the body of the front of the shipment advices. The *Windsor Mills*, *Tri-City* and *Arthur Philips* cases are squarely in point.

It will also be noted that the reference clause was neither above any signature line nor in the body of the shipment advices. Instead it was in the lower righthand corner. For these reasons, also, compliance with the "reason to know" requisite has not been shown. In *Application of Liberty Country Wear*, 96 N.Y.S.2d 134 (N.Y., Supreme Ct., N.Y. Co. 1950), in which a reference clause on the seller's purchase order form was located immediately above a line for the buyer's signature and in which the buyer had signed the form, the Court distinguished various cases, including the *Arthur Philip* case, on the ground that it did not appear in those cases that the reference clause was in the body of the document and preceded a line for the signature of the buyer. Thus, these two deficiencies also preclude compliance with the "reason to know" requisite.

Knit-Away contends that the fact that there were a number of shipment advices somehow overcomes the inconspicuousness of the reference clauses and the shipment advices' lack of obvious contractual significance. If, as they clearly do, these deficiencies negative "reason to know" in the cases of the initial shipment advice, they necessarily have the same effect as to the subsequent shipment advices. The Court so held in *Windsor Mills* and *Frances Hosiery Mills*, although, in each of these cases, there had been a number of written confirmations.

In fact, it will be noted that the Court refused to hold as a matter of law that the buyer was bound by the

arbitration clause in *Dorton* even though there had been fifty-five different written confirmations containing arbitration clauses, and directed a trial on the issue whether the arbitration clause was a "material alteration". Although the Court did not discuss the question whether the buyer had had reason to know of the arbitration clause, it is at least interesting to note that the Court was not deterred by the multiplicity of the written confirmations from holding that, if the arbitration clause was found to be a material alteration, the buyer would not be bound by it.[12]

For all of the above reasons, Knit-Away has failed to establish that Foster had reason to know of the arbitration clauses. Knit-Away's Petition should, therefore, be dismissed. In the alternative, if the Court declines to dismiss the Petition on this ground, there should be a trial on the various issues discussed in this section. Such a trial was ordered, for example, in the *Tri-City* and *Wolfkill* cases.

CONCLUSION

For all of the above reasons, the decision below granting Knit-Away's Petition should be reversed, and Knit-Away's Petition should be dismissed.

In the alternative, if the Court determines not to dismiss Knit-Away's Petition, there should be a trial on the issues discussed in this Brief, including particularly the

12. Incidentally, it should be noted that, although there were twenty shipment advices in the case at bar, they were bore only eleven different dates, since three were sent on 9/12/74, two on 9/26/74, three on 10/9/74, one on 10/11/74, one on 11/1/74, one on 11/12/74, one on 11/15/74, one on 11/21/74, three on 12/3/74, three on 2/6/75 and one on 2/17/75.

issue whether the arbitration clause was a "material alteration" and the issue whether Foster had "reason to know" of the arbitration clause.

Respectfully submitted,

Philip C. Patterson
1100 Four Penn Center Plaza
Philadelphia, Pennsylvania 19103

Of Counsel:

Blank, Rome, Klaus & Comisky
1100 Four Penn Center Plaza
Philadelphia, Pennsylvania

Martin B. McNamara
340 Madison Avenue
New York, New York 10017

Of Counsel:

Shea, Gould, Climenko,
Kramer & Casey
340 Madison Avenue
New York, New York 10017

SCHEDULE A

Analysis of the shipment advices and unpaid invoices issued by Knit-Away, Inc. to L. W. Foster Sportswear Co. in 1974 and 1975 which are contained in Exhibits A, B, F and G to Knit-Away, Inc.'s Petition to Compel Arbitration.

SHIPMENT ADVICES			INVOICES		
Identifying No.	Date	Yards	Identifying No.	Date	Yards
206, 261-01	9/12/74	10000	707690	10/15/74	7590.4
			94458	10/15/74	2793.9
206, 261-02	9/12/74	17500	707691	10/15/74	6974.4
			94457	10/15/74	5127.6
			94469	10/18/74	3254.0
206, 261-03	9/12/74	17500	94471	10/19/74	7359.9
			707868	11/ 1/74	8082.5
			707869	11/ 1/74	2274.7
			708816	11 1/74	1448.0
206, 540-01	9/26/74	20400	707824	10/31/74	2059.3
			707860	11/ 1/74	3735.1
			707880	11/ 1/74	11433.0
			708169	11/ 1/74	2711.8
206, 542-00	9/26/74	15000	708468	1/10/75	1460.7
			95293	1/31/75	2233.5
			95285	1/31/75	1070.0
			708495*	1/31/75	4473.3
206, 543-00	10/ 9/74	5000	707869	11/ 1/74	2235.5
			708006	11 /1/74	3037.6
			708593	1/31/75	1592.5
206, 261-04	10/ 9/74	5000	707869	11/ 1/74	2274.7
			708006	11/ 1/74	3037.6
206, 338-04	10/ 9/74	5000			
206, 673-00	10/11/74	4500			
206, 545-01	11/ 1/74	20000	708172	11/14/74	4547.9
			708471	1/10/75	4523.1
			708564	1/27/75	1449.2
			708609	1/31/75	2685.3
206, 544-01	11/12/74	30000	708171	11/14/74	3320.0
			708470	1/10/75	6939.3
			708533	1/24/75	7047.9
			708563	1/24/75	2523.5
			708594	1/31/75*	4504.9

SHIPMENT ADVICES			INVOICES		
Identifying No.	Date	Yards	Identifying No.	Date	Yards
206, 622-00	11/15/74	7000	708599	1/31/75	1673.6
			708611	1/31/75	1574.2
206, 623-00	11/21/74	150			
206, 604-01	12/ 3/74	10000	708565	1/31/75	10814.8
			708898	1/30/75	6894.1
206, 605-01	12/ 3/74	10000	708987	1/30/75	5752.1
			708597	1/31/75	4574.7*
206, 608-01	12/ 3/74	20000	708599	1/31/75	1678.8
			708600	1/31/75	1784.8
207, 065-00	2/ 6/75	1761	708676	2/10/75	2732.9
207, 066-00	2/ 6/75	4770	95519	2/10/75	1552.4
207, 067-00	2/ 6/75	67			
207, 073-00	2/17/75	2475	708938	not stated	1651.4

*In the instances when an asterisk appears after a number or date, the number or date in the copy of the exhibit supplied to us by Knit-Away, Inc. is so nearly illegible that there is doubt as to the accuracy of the number or date in this schedule.